

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 90-380
)	
RIO GRANDE BROADCASTING CO.)	File No. BPH-880815MV
)	
ROBERTO PASSALACQUA)	File No. BPH-880816NN
)	
IRENE RODRIGUEZ DIAZ DE McCOMAS)	File No. BPH-880816OR
)	
UNITED BROADCASTERS COMPANY)	File No. BPH-880816OW
)	RECEIVED
For a Construction Permit for a New FM)	
Station on Channel 247A at)	JUL 8 1999
Rio Grande, Puerto Rico)	

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: The Commission

MASS MEDIA BUREAU'S OPPOSITION TO
PETITION FOR RECONSIDERATION

1. On June 24, 1999, Rio Grande Broadcasting Company ("RGB") and United Broadcasters Company ("United") (collectively, "Petitioners") filed a "Petition for Reconsideration ("Petition"). The Mass Media Bureau opposes the Petition.

2. The Petition seeks reconsideration of *Rio Grande Broadcasting*, FCC 99-111, released May 25, 1999 ("*Rio*"). In *Rio*, the Commission dismissed a Joint Request for Approval of Settlement Agreement filed by RGB and United. In doing so, the Commission relied upon its reconsideration of *Amendment of Parts 1, 73 and 74 - Competitive Bidding*,¹ FCC 99-74, released April 20, 1999 ("*Reconsideration*"). Therein, the Commission reaffirmed that applicants who were not finally denied or dismissed would be entitled to participate in an

¹ 13 FCC Rcd 15920 (1998) ("*Auction Order*"). It is the Bureau's understanding that United is an intervenor in *Orion Communications, Ltd. v. FCC*, No. 98-1424 (D.C. Cir., filed September 15, 1998), wherein appellants seek court review of the Commission's *Auction Order*.

auction without regard to outstanding qualifications issues. The Commission further determined, however, that the only exception to this policy would be for applicants who executed settlement agreements prior to February 1, 1998, which were expressly conditioned upon resolution of specified basic qualifications issues involving non-settling applicants. *Reconsideration*, ¶ 18. Because the RGB/United settlement agreement was executed after February 1, 1998, and was expressly conditioned upon resolution of questions concerning the non-settling applicants, the Commission held that dismissal of the joint request was warranted. *Rio*, ¶ 11.

3. Petitioners contend there is no rational reason for distinguishing between settlement agreements executed before February 1, 1998, and those executed subsequently. They acknowledge that Section 309(l)² of the Communications Act made special provision for treatment of settlement agreements executed during the specified statutory period (which ended February 1, 1998) but argue that the statutory provision only required that the Commission waive rules so as to permit settlements. In this case, Petitioners note that no rule waivers were requested or required; rather, they simply sought resolution of the questions concerning the non-settling applicants. Thus, they conclude, the fact that their settlement was

² In pertinent part, Section 309(l) states:

(l) APPLICABILITY OF COMPETITIVE BIDDING TO PENDING COMPARATIVE LICENSING CASES. - With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall -

...

(3) waive any provision of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.

executed after February 1, 1998, should be of no consequence.

4. Petitioners also contend that Sections 309(j)(1)³ and 309(j)(6)(E),⁴ of the Communications Act require that authorizations be awarded by competitive bidding only when there exists more than one qualified applicant and where mutual exclusivity cannot be resolved by other means. Because, according to Petitioners, approval of their merger would leave only one qualified applicant, the Commission lacks authority to award the Rio Grande, Puerto Rico license by competitive bidding. In this regard, Petitioners contend that the conservation of resources is an insufficient reason to defer basic qualifications questions until after an auction. Likewise, Petitioners dispute that the Commission has authority to reconvene hearing proceedings only to consider the qualifications of the auction winner. Rather, Petitioners argue, the Commission must consider any issues affecting the basic qualifications of all remaining applicants again because the Commission has authority to award licenses by competitive bidding only when there is more than one qualified applicant.

³ That paragraph states:

(1) GENERAL AUTHORITY. - If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

⁴ That subsection provides in pertinent part:

(6) Rules of Construction. - Nothing in this subsection, or in the use of competitive bidding, shall --

...

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

5. Reconsideration is appropriate where the petitioner demonstrates either a material error or omission in the original order or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 47 C.F.R. § 1.106. Because Petitioners do not meet either test, their Petition should be denied.

6. First, Petitioners do not demonstrate the existence of a material error or omission. Clearly, as explained fully in *Rio*, ¶¶ 8-11, dismissal of the joint request was required. In both *Auction Order*, 13 FCC Rcd at 15952-55, and, subsequently, in *Reconsideration*, ¶¶ 16-18, the Commission considered at length whether the public interest would be better served by resolving qualifying issues raised against applicants before or after an auction was held. Suffice it to say, the Commission ultimately decided that the Communications Act, including Section 309(j), and related legislative history did not clearly answer that question. After considering many factors, the Commission further decided that it would likely be more efficient to hold hearings regarding such issues after an auction was held.⁵ The Commission further decided that the only exception to this policy should be for applicants who entered into settlements prior to February 1, 1998 - that is, during the period specified in Section 309(l)(3) - which settlements were expressly conditioned upon resolution of basic qualifications issues regarding non-settling applicants. In so deciding the Commission explained that the clear thrust of Section 309(l)(3) was to facilitate settlements - a purpose which would be thwarted if the Commission were to delay consideration of a basic issue the

⁵ In this regard, *see also Reconsideration*, ¶¶ 53-56.

resolution of which could eliminate the need for an auction. However, as explained in *Auction Order* and *Reconsideration*, settlements entered into after February 1, 1998, which are conditioned upon resolution of basic qualifying issues, do not further any particular statutory purpose. Accordingly, while Petitioners may disagree with the choices the Commission made as to what constitutes a basic qualifying issue and as to when basic qualifying issues should be resolved, they have not demonstrated a material error or omission in *Rio*. Second, Petitioners raise no fact not known or not existing until after their last opportunity to present such matters. In sum, Petitioners have not advanced arguments which justify reinstatement of the joint request for approval of their settlement agreement.

7. Accordingly, the Petition for Reconsideration should be denied.

Respectfully submitted,

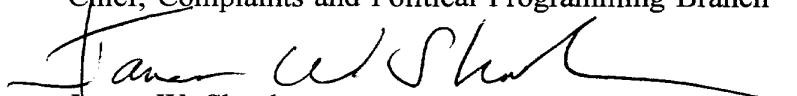
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July 8, 1999

CERTIFICATE OF SERVICE

Talya Lewis, secretary of the Complaints and Political Programming Branch, Mass Media Bureau, certifies that she has on this 8th day of July, 1999, sent by first class United States mail, copies of the foregoing "Mass Media Bureau's Opposition to Petition for Reconsideration" to:

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